In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-592

KANSAS REFINED HELIUM COMPANY, A DIVISION OF ANGLE INDUSTRIES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Petitioner, Kansas Refined Helium Company, A Division of Angle Industries, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 28, 1976.

OPINION BELOW

The Opinion of the Court of Appeals, unofficially reported at 92 LRRM 3185, appears in the Appendix hereto. The Opinion rendered by the National Labor Relations Board also appears in the Appendix hereto, and was reported as follows: *Kansas Refined Helium Company, A Division of Angle Industries, Inc., and Oil, Chemical and Atomic Workers International Union, AFL-CIO,* 215 NLRB No. 67 (Dec. 10, 1974).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 28, 1976. A timely Petition for Rehearing *en banc* was denied on August 2, 1976, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. May a backpay remedy promulgated in a case of first impression by the National Labor Relations Board be reversed by the Circuit Court of Appeals on the basis that it does not "understand" the Board's decision, without the Court of Appeals making the requisite findings required by the United States Supreme Court to overrule a Board order?

2. Can a dischargee reject an offer of reinstatement made pursuant to and in conformity with a 10(j) order obtained by the National Labor Relations Board and then obtain an award for backpay losses he would not have incurred if he had accepted such court-ordered reinstatement?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§160. Prevention of Unfair Labor Practices

> "(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion,

> the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.
>
> . . .
>
> "(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person who has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

STATEMENT OF THE CASE

Three employees, Johnson, Harris and Bishop, were discharged by the Petitioner (hereinafter referred to as

"Employer"), in September, 1966. The National Labor Relations Board sought and obtained a 10(j) injunctive order through the United States District Court for the District of Kansas that the Employer reinstate these employees "to their former positions pending the final determination of this matter by the Board; and, that [the Employer] tender to the named employees transportation costs sufficient to enable the named employees and their families to return to work." (Order of the District Court for the District of Kansas Granting Temporary Injunction in *Sacks* v. *Angle,* Civil Action No. W-3766, dated April 5, 1967).

In requesting the District Court to enter the 10(j) order, the Board represented to the District Court that:

> ". . . it is essential, just, proper and appropriate, for the purposes of effectuating the policies of the Act and avoiding substantial irreparable and immediate injury to such policies, to the employees, the union, and the public welfare, and in accordance with the purposes of Section 10(j) of the Act, that, . . . respondent be enjoined and restrained . . ." (Board's Petition for Injunction to District Court for the District of Kansas in *Sacks* v. *Angle,* Civil Action No. W-3766).

The District Court, in granting the Board's request, stated:

> "The purpose of any injunctive relief granted herein must be to preserve or restore the status quo which was affected by the employer's acts, so far as necessary to prevent respondent's successful frustration of any order the Board may ultimately make." (Decision of District Court for the District of Kansas in *Sacks* v. *Angle,* Civil Action No. W-3766, 65 LRRM 2098, 2100, dated April 5, 1967).

The injunctive order was appealed by the Employer to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit approved the use of the 10(j) order for the purpose sought by the Board and stated as follows:

> "Preservation and restoration of the status quo are then appropriate considerations in granting temporary relief pending determination of the issues by the Board." (*Angle* v. *Sacks*, 382 F.2d 655, 660 (1967)).

Pursuant to and in conformity with the 10(j) order, the Employer offered immediate reinstatement and transmitted checks for claimed transportation costs in May, 1967. All three employees failed to accept such offers. When the matter was "finally determined" in early 1972, Angle issued final offers of reinstatement pursuant to the Board's order. These offers were also refused. During the course of the litigation, the dischargees made substantially less from their interim employment than they would have made had they accepted reinstatement pursuant to the 10(j) order.[1]

The Board, sitting as a full five-member panel, found that the Employer fully complied with the District Court's 10(j) order to offer reinstatement, and treated such offers of reinstatement as any other valid interim offer of employment. Accordingly, the Board held such 10(j) offers of reinstatement to be valid offers as satisfactory, equivalent, interim employment, sufficient to toll the Employer's backpay liability. In so holding, the Board stated:

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[1]For example, Harris failed to work at all for approximately one full year, and the total loss he incurred by not accepting the interim 10(j) offer of reemployment obtained by the Board from the District Court was approximately $11,000.00.

"*Respondent having been careful to follow the court's order exactly, we see no reason not to give these offers of reinstatement the same status as any other valid, interim offer.* Though it is true that, should Respondent have prevailed before the Board, the alleged discriminatees' reinstatement would in all likelihood have come to an end, that would have been an implied risk regardless of whether or not Respondent expressly so stated. Moreover, while the discriminatees would have been 'taking a chance' in accepting Respondent's interim offer, depending on the outcome of the litigation, so also was Respondent, in the sense that, pursuant to the court's order, it was being required to do something which, ultimately, the Board or courts might find it had not had an obligation to do. *Since Respondent offered interim employment to these employees, to their old jobs and at their old rates, at the express request of the Board under Section 10(j), we are hard-pressed to say this was not satisfactory, equivalent interim employment, sufficient to toll Respondent's backpay liability during this period.*" (Appendix, pp. A19-A20). [Emphasis added].

The Oil, Chemical and Atomic Workers International Union, AFL-CIO filed a Petition for Review with the Circuit Court of Appeals for the District of Columbia.[2] The District of Columbia Circuit heard the case and concluded that Johnson, Harris and Bishop did not incur a willful loss of earnings by their rejection of the Employer's offer of reinstatement and reversed the order of the Board and remanded the case to the Board for further proceedings.

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[2]The Circuit Court of Appeals below had jurisdiction pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. §160(f).

REASONS FOR GRANTING THE WRIT

1. The decision below is in error and was decided in a way in conflict with applicable Supreme Court decisions governing the scope of judicial review of National Labor Relations Board promulgated backpay remedies under 29 U.S.C. §160(c).

2. The decision below is a serious hindrance to the effective administration of 29 U.S.C. §160(j), as it discourages dischargees from accepting reinstatement offers made pursuant ot a §160(j) order, since they would still be entitled to backpay, and makes meaningless the National Labor Relations Board's contention that such an order is necessary "to avoid substantial, irreparable and immediate injury."

3. The decision below is an important one of first impression interpreting the remedial provisions of 29 U.S.C. §160(j) and is inconsistent in theory with the National Labor Relations Board and Court of Appeal decisions barring backpay to a dischargee who refuses to accept substantially equivalent employment.

1. The Decision Below Is in Error and Was Decided in a Way in Conflict With Applicable Supreme Court Decisions Governing the Scope of Judicial Review of National Labor Relations Board Promulgated Backpay Remedies Under 29 U.S.C. §160(c).

The National Labor Relations Board and the Court of Appeals for the District of Columbia Circuit, in the present case, were confronted, for the first time, with the question of whether a dischargee, who rejects an employer's offer of reinstatement made pursuant to and in

conformity with a §160(j) order (hereinafter referred to as a 10(j) order) obtained by the Board, incurs a willful loss of earnings to toll the employer's backpay liability.

In its decision, the District of Columbia Circuit Court acknowledged that the Board, in its administration of the Act, has broad discretion in shaping remedies, and noted that:

> ". . . [the Board] cannot act arbitrarily nor can it treat similar situations in dissimilar ways. The Board has a responsibility to administer the Act fairly and rationally." (Appendix, p. A12).

In considering the Board's decision in the present case, the Circuit Court concluded:

> "Although the Board's decision could have been more clearly articulated, we believe that a fair reading necessarily leads to the conclusion that the Board relied on the willful loss of earnings doctrine." (Appendix, p. A8).

However, after recognizing that the Board's decision was not ambiguous, the District of Columbia Circuit Court proceeded to render its own interpretation of the facts pertaining to each dischargee. In so doing, the Circuit Court failed to apply this Court's principle that, particularly in a case of first impression, Congress has invested the Board, not the courts, with broad discretion to fashion remedies to best effectuate the policies of the National Labor Relations Act (hereinafter referred to as the "Act"). To the contrary, the court stated that "we are at a loss to understand the Board's decision that Johnson's and Harris' refusal to accept Angle's temporary offer of reinstatement constituted a willful loss of earnings" (Appendix, p. A14) and further that they could not "understand how Bishop could be found to have incurred a willful loss

of earnings." (Appendix, p. A16). The court's reasoning seems to be that since Johnson and Harris were earning more money elsewhere at the time the temporary order of reinstatement was made, they did not incur a willful loss of earnings, and that Bishop did not incur a willful loss of earnings by refusing to leave a permanent job to accept a temporary one 100 miles away.

A review of the District of Columbia Circuit Court's opinion reveals rather clearly that the court simply disagrees with the judgment expressed by the Board in promulgating a remedy in a case of first impression before the Board. There is no finding that the Board in any way abused its broad discretion in shaping remedies, that the Board acted arbitrarily, that the Board treated similar situations in dissimilar ways, or that the Board failed to administer the Act fairly and rationally in rendering the backpay remedy.

Section 10(c) of the Act empowers the Board to order a violator of the Act "to take such affirmative action, including reinstatement of employees with or without backpay, as will effectuate the policies of this Act." (29 U.S.C. §160(c) (1970)). In interpreting the Board's power under Section 10(c) of the Act, this Court has consistently held that:

> "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience. When the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of back pay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" (*N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346, 73 S. Ct. 287, 289 (1952) (Citing *Virginia Electric*

& Power Co. v. *N.L.R.B.*, 319 U.S. 533, 540, 63 S. Ct. 1214, 1218)). (See also, *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 216, 85 S. Ct. 398, 406 (1964)).

The Supreme Court has recognized that the Act "does not create rights for individuals which must be vindicated according to a rigid scheme of remedies." (*Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194 (1941)). Rather, "the remedial power of the Board is 'a broad discretionary one, subject to limited judicial review.'" (*N.L.R.B.* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263, 90 S. Ct. 417, 420 (1969) (Citing *Fibreboard Corp.* v. *N.L.R.B.*, 379 U.S. 203, 216, 85 S. Ct. 398, 406 (1964)). In particular, "[t]he remedy of backpay . . . is entrusted to the Board's discretion; it is not mechanically compelled by the Act." (*Phelps Dodge, supra,* 313 U.S. at 198). Accordingly, it "is for the Board to wield, not for the Courts." (*N.L.R.B.* v. *Rutter-Rex Mfg. Co., supra,* 396 U.S. at 263, 90 S. Ct. at 420). More recently, the Supreme Court has characterized the above standard as requiring a decision to be "arbitrary and capricious or an abuse of discretion" before the court should alter a Board's decision. (*Linden Lumber Division, Summer & Co.* v. *N.L.R.B.*, 419 U.S. 301, 95 S. Ct. 429, 434 (1974)).

The manner in which the District of Columbia Circuit Court decided the present case is not only in direct conflict with the decisions of the Supreme Court, but is also contrary to the court's own ruling in the companion case of *O.C.A.W.* v. *N.L.R.B.*, 144 U.S. App. D.C. 167, 445 F.2d 237, 246 (D.C. Cir. 1971, *cert. den.* 404 U.S. 1039 (1972)) where the court stated that a Board remedy will stand unless it can be said to be "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."

In the present case, the Board based its determination entirely upon the scheme and provisions of the Act and set forth its reasoning as follows:

> There is no contention that [the Employer] did not fully comply with the district court's order to offer these men reinstatement, *pendente lite.* [The Employer] having been careful to follow the court's order exactly, we see no reason not to give these offers of reinstatement the same status as any other valid, interim offer. Though it is true, should [the Employer] have prevailed before the Board, the alleged discriminatees' reinstatement would in all likelihood have come to an end, that would have been an implied risk regardless of whether or not [the Employer] expressly so stated. Moreover, while the discriminatees would have been 'taking a chance' in accepting [the Employer's] interim offer, depending on the outcome of the litigation, so also was [the Employer], in the sense that, pursuant to the court's order, it was being required to do something which, ultimately, the Board or courts might find it had not had an obligation to do. Since [the Employer] offered interim employment to these employees, to their old jobs and at their old rates, at the express request of the Board under Section 10(j), we are hard-pressed to say this was not satisfactory, equivalent interim employment, sufficient to toll [the Employer's] backpay liability during this period. (Appendix, pp. A19-A20).

Nowhere in the decision of the District of Columbia Circuit Court is there any attempt to fulfill the judicial standards as prescribed by the Supreme Court in overruling the decisions of the Board concerning the appropriate backpay remedy. Because the issue in the present case was one of first impression for the Board and was

thereby the first opportunity given to the Board to apply its knowledge and experience to determine the relationship of a backpay remedy to the administrative policies in a 10(j) injunctive proceeding, judicial standards for review should not only be carefully followed, but should be clearly delineated in the court's decision. The silence of the District of Columbia Circuit Court's opinion in this regard places it in *direct conflict* with controlling Supreme Court decisions governing the scope of judicial review of National Labor Relations Board promulgated backpay remedies under 29 U.S.C. §160(c).

2. The Decision Below Is a Serious Hindrance to the Effective Administration of 29 U.S.C. §160(j), As It Discourages Dischargees From Accepting Reinstatement Offers Made Pursuant to a §160(j) Order, Since They Would Still Be Entitled to Backpay, and Makes Meaningless the NLRB's Contention That Such an Order Is Necessary "to Avoid Substantial, Irreparable and Immediate Injury."

The exceptional importance of the present case goes much deeper than the fact that the question presented before the District of Columbia Circuit and the National Labor Relations Board was one of first impression. At the very heart of the case is the Board's basis for obtaining a 10(j) injunctive order from the federal courts. Section 10(j) provides in part:

> "The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person who has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order." (29 U.S.C. §160(j) (1970)).

This 10(j) injunction power which Congress gave to the Board is undeniably a unique and important remedy, used only in cases deemed by the Board to be exceptional. Indeed, the 10(j) injunction obtained against the Employer was the first ever sought in the Seventeenth Region of the Board. The obvious concern of the Board in seeking the injunctive 10(j) order is readily apparent from the Board's Petition to the District Court in the present case. For example, when it requested the District Court to enter the 10(j) order, which required the Employer to offer reinstatement to three employees, the Board represented to the court that:

> "It is necessary, just, and proper that the effects of the aforesaid acts and conduct of respondent be dissipated by remedial action so that respondent's employees can enjoy the rights guaranteed them by the statute.
>
> . . .
>
> ". . . it is essential, just, proper and appropriate, *for the purposes of effectuating the policies of the Act and avoiding substantially irreparable and immediate injury to such policies, to the employees,* the union *and the public welfare,* and in accordance with the purposes of Section 10(j) of the Act, that, pending the final disposition of the matters involved pending before the Board, Respondent be enjoined and restrained. . . ." (Board's Petition for Injunction to the District Court for the District of Kansas in *Sacks* v. *Angle,* Civil Action No. W-3766). [Emphasis added].

The District Court, in granting the Board's request, specifically adopted the rationale that the status quo can and is being preserved and restored through the 10(j) order and reinstatement offer as follows:

> "*The purpose of any injunctive relief granted herein must be to preserve or restore the status quo* which was affected by the employer's acts so far as necessary to prevent respondent's successful frustration of any order the Board may ultimately make." (Decision of District Court for the District of Kansas in *Sacks* v. *Angle*, Civil Action No. W-3766, 65 LRRM 2098, 2100, dated April 5, 1967). [Emphasis added].

Finally, the Tenth Circuit Court of Appeals approved the use of the 10(j) order for the purpose of preserving and restoring the status quo as follows:

> "*Preservation and restoration of the status quo are then appropriate considerations* in granting temporary relief pending determination of the issues by the Board." (*Angle* v. *Sacks*, 382 F.2d 655, 660 (1967)). [Emphasis added].

Thus, in obtaining the 10(j) order, the Board represented to the federal courts that there was a vital need for the requirement of an offer of temporary reinstatement to the dischargees in order to preserve and restore the status quo; that is, place the employees in their former positions pending determination of the issues by the Board. Therefore, the Board, in subsequently promulgating the backpay remedy herein, was properly concerned with the enforcement procedure under 29 U.S.C. §160(j) when it stated:

> "Though it is true that, should Respondent have prevailed before the Board, the alleged discriminatees' reinstatement would in all likelihood have come to an end, that would have been an implied risk regardless of whether or not Respondent expressly so stated. Moreover, while the discriminatees would have been 'taking a chance' in accepting Respondent's interim offer, depending on the outcome of the litigation, so also was Respondent, in the sense that, pursuant to the court's order, it was being required to do something which, ultimately, the Board or courts might find it had not had an obligation to do." (Appendix, pp. A19-A20).

It is apparent from the rationale of the Board in promulgating the backpay remedy in the present case, that *the Board was not only determining the relationship of the remedy to the facts in the case, but was also determining the relationship of the remedy to the Board's policy in seeking injunctive relief through Section 10(j) of the Act.* This is shown by the fact that, in its decision, the Board recognizes that employees have a certain responsibility under the 10(j) order obtained for their benefit. The Board, in determining its administrative and remedial policy, was properly concerned that if employees could obtain backpay relief notwithstanding their rejection of the emergency 10(j) order requested for them by the Board, then the federal courts might determine that there is not the urgent need for or benefit in a 10(j) reinstatement order which the Board might request. The Board, also, apparently recognizes that it would violate public policy for the Board to engage in substantial expense and utilization of the courts, contending before the federal court system that reinstatement was necessary in order to protect the employees and the public welfare, and then not require the employees to accept the results of such efforts.

The District of Columbia Circuit Court, in its decision below, relegates consideration of the 10(j) injunction procedure to a footnote comment and concludes therein that if the Board's decision were construed to hold that a temporary offer of reinstatement tolls backpay liability, "employees would prefer that a §10(j) order not be sought; . . ." (Appendix, p. A11). In so concluding, the court ignores the recognized purpose of the 10(j) order as expressed by Congress and the courts; that being to preserve the status quo pending litigation. (See, *Angle* v. *Sacks*, 382 F.2d 655 (10th Cir. 1967), and S. Rep. No. 105, 80th Congress, 1st Sess. 27 (1947)).

If circumstances require the Board to seek and the courts to order immediate 10(j) reinstatement plus payment of transportation costs "to effectuate the policies of the Act and avoid substantial irreparable and immediate injury", then the dischargees must be required to accept such offers or be responsible for any losses incurred by them through rejection of such offers.

In light of the Board's policy in seeking injunctive relief through a Section 10(j) order, the decision below of the District of Columbia Circuit Court of Appeals is a serious hindrance to the effective administration of 29 U.S.C. §160(j).

3. The Decision Below Is an Important One of First Impression Interpreting the Remedial Provisions of 29 U.S.C. §160(j) and Is Inconsistent in Theory With the National Labor Relations Board and Court of Appeals Decisions Barring Backpay to a Dischargee Who Refuses to Accept Substantially Equivalent Employment.

In determining the present case, the Board and the District of Columbia Circuit Court, for the first time, were

confronted with an offer of interim employment in conjunction with a 10(j) order. The Employer's offer of reinstatement was of *exactly equivalent employment* at the express request of the Board under the 10(j) order. In view of these circumstances, the Board concluded:

> ". . . we are hard-pressed to say that this was not satisfactory, equivalent interim employment, sufficient to toll Respondent's backpay liability during this period." (Appendix, p. A20).

In contrast, the District of Columbia Circuit Court's decision allows employees to *refuse* to accept not only "substantially equivalent" employment, but "exactly the same" employment, without incurring a willful loss of earnings and is directly in conflict with the Board's rule that public policy requires genuine offers of reinstatement to cut off backpay liability due to the willfully incurred loss of earnings by the dischargee.

The United States Supreme Court, in *Phelps Dodge Corp.*, 313 U.S. 177 (1941), sets forth backpay rights and responsibilities of employers and dischargees between the date of discharge and the date of final determination of the matter. These can be paraphrased as follows:

1. Companies must make workers whole for losses suffered on account of unfair labor practice; except
2. Workers cannot recover losses willfully incurred.

The Supreme Court stated these principles as follows:

> "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual

earnings by the worker, but also for losses which he willfully incurred." (*Phelps Dodge Corp.*, 313 U.S. at 198-199).

The Supreme Court also points out that this is not merely based on the common law rule that one who suffers loss must mitigate the damage, but is also based upon the "healthy policy of promulgating production and employment." (*Phelps Dodge Corp.*, 313 U.S. at 200).

This general principle against reimbursement for losses which have been "willfully incurred" has been adopted by both the National Labor Relations Board and reviewing courts. The Second Circuit, in applying this rule, stated in the following succinct footnote:

> "What constitutes a willful loss of earnings is a concept that has been developed in a large number of cases since the *Phelps-Dodge* decision. It is accepted by the Board and reviewing courts that a discriminatee is not entitled to backpay to the extent that he fails to remain in the labor market, *refuses to accept substantial equivalent employment*, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason." (*N.L.R.B.* v. *Mastro Plastics Corp.*, 354 F.2d 160, 174, Note 3 (2d Cir. 1965). [Emphasis added].

Also, prior Board precedent makes it clear that dischargees have an obligation to accept even temporary interim employment in order to minimize their loss and encourage the "healthy policy of promoting production and employment" set forth by the Supreme Court in *Phelps Dodge, supra.* This was acknowledged by the Board in *Southern Silk Mills, Inc.*, 166 NLRB No. 96 (1956), where it set forth the following rationale:

> "Offsetting this is a distinct possibility that he might have obtained two months of temporary work each year at the freezing plant of Dayton." (116 NLRB at 787).

Applying these rules to the instant case leads to the rather clear conclusion: The dischargees willfully refused to accept not only "substantially equivalent" employment, but in this case, "exactly the same" employment. This was recognized by the Board, when for the first time, it was confronted with an offer of interim employment in conjunction with a 10(j) order. In finding that the Employer's backpay liability was tolled, the Board found that the Employer offered interim employment to the dischargees "to their old jobs and at their old rates, at the express request of the Board under Section 10(j)" and further concluded that "we are hard-pressed to say this was not *satisfactory, equivalent interim employment,* sufficient to toll Respondent's backpay liability during this period." (Appendix, p. A20). [Emphasis added].

The decision of the court below sets the policy that employees need not accept 10(j) reinstatement offers of *exactly equivalent employment* and is inconsistent in theory with Board and Court of Appeals decisions barring backpay to a dischargee who refuses to accept substantially equivalent employment. The Circuit Court's decision is directly in conflict with public policy. If circumstances require the Board to seek and the courts to order immediate 10(j) reinstatement plus payment of transportation costs "to effectuate the policies of the Act and avoid substantial irreparable and immediate injury," then the dischargees must be required to accept such offers or be responsible for any losses incurred by them through rejection of such offers of exactly equivalent employment.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1975

No. 75-1065

Oil, Chemical, and Atomic Workers
International Union, AFL-CIO,
Petitioner

v.

National Labor Relations Board,
Respondent

Kansas Refined Helium Co.
Intervenor

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges.

ORDER

(Date of Decision: August 2, 1976)

The suggestion for rehearing *en banc* filed by intervenor Kansas Refined Helium Company having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

/s/ George A. Fisher
George A. Fisher
Clerk

Circuit Judge MacKinnon would grant intervenor's suggestion for rehearing *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1065

Oil, Chemical, and Atomic Workers International Union, AFL-CIO, Petitioner

v.

National Labor Relations Board, Respondent
Kansas Refined Helium Co., Intervenor

Petition for Review of an Order of the National Labor Relations Board

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Argued January 21, 1976

Decided June 28, 1976

Jerry D. Anker, with whom *Lawrence J. Sherman* was on the brief, for petitioner.

Jay E. Shanklin, Attorney, National Labor Relations Board, with whom *John S. Irving*, Deputy General Counsel, and *Elliott Moore*, Deputy Associate General Counsel, National Labor Relations Board, were on the brief, for respondent.

Marvin J. Martin, with whom *W. Stanley Churchill* was on the brief, for intervenor.

Before McGOWAN, LEVENTHAL and WILKEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* McGOWAN.

McGOWAN, *Circuit Judge*: This appeal presents yet another controversy in the seemingly endless litigation stemming from unfair labor practices committed in 1966 at the Kansas Refined Helium Company (KRH) plant in Otis, Kansas, of which George A. Angle is sole proprietor. Specifically at issue is whether, under the circumstances of this case, the refusal of three of the six illegally discharged employees to accept Angle's temporary offer of reinstatement, made pursuant to a court order, constitutes a willful loss of earnings.

I

In response to a union organizing effort in 1966 at the KRH plant, Angle "embarked upon an anti-union campaign marked by massive and systematic violations of the Act," including, *inter alia*, "coercive interviews with virtually every employee, threats of plant closure and discharge for union activity, and the discharge of 6 union supporters." *George A. Angle, d/b/a Kansas Refined Helium Co.*, 176 N.L.R.B. 1032 n.4 (1969).

Following the filing of charges in September, 1966, and the issuance by the Board of a complaint, a proceeding was instituted in the United States District Court for the District of Kansas by the Board's Regional Director pursuant to Section 10(j) of the National Labor Relations Act.[1]

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[1] 29 U.S.C. § 160(j) (1970) provides:

> (j) The Board shall have power upon issuance of a complaint as provided in subsection (b) of this section
>
> *(Continued on following page)*

On April 5, 1967 the District Court issued an injunction ordering Angle to reinstate the six dischargees pending final disposition of the charges by the Board and to tender sufficient transportation costs to permit them to return to work. *Sacks v. Angle*, 65 L.R.R.M. 2098 (1967), *aff'd*, 382 F.2d 655 (10th Cir. 1967).

On April 25, following an unsuccessful attempt to stay the injunction, Angle made an offer of reinstatement to the six discriminatees:

> Judge Brown has now ruled that you are to be offered reinstatement to your former position pending the final determination of this matter by the Board; and that we are to pay transportation costs sufficient to

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Footnote continued—

> charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Section 10(j) was passed in recognition of the possibility that the purposes of the Act could be defeated through the delay between the filing of charges and the availability of a legally enforceable remedy. S. REP. No. 105, 80th Cong., 1st Sess. 27 (1947):

> Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under the present act, the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the *status quo* pending litigation.

enable you and your family to return to work, if you accept reinstatement to your former position pending the final determination of this matter by the Board.

In order for the employees and their families to make their plans and in order for me to make the necessary arrangements regarding the present personnel at the KRH plant, and to expedite Judge Brown's temporary injunction, will you please let me know if you desire to return to work pending the final outcome of the KRH matter. If so, please calculate transportation costs sufficient to enable you and your family to return to work. In case you do not desire to return to work pending the final outcome of the KRH matter before the NLRB, it is not necessary that you calculate these transportation costs. In either event, will you complete the attached information and return it to me in the enclosed envelope.

App. 67, 69, 72. While both Harris and Johnson refused this offer from the outset—Johnson having relocated in Carrollton, Texas and Harris in Seattle, Washington—Bishop initially accepted. App. 10, 20 n. 10.

Following further correspondence, on June 9, 1967 Angle sent Bishop (along with Garrett and Rodgers, not parties to this appeal) a letter stating:

> In my last letter to you dated May 25, 1967, I told you I was going to the KRH plant. Following my return from the plant, I received a copy of an order from the NLRB indicating that the Union has withdrawn its request for an election and vacating the original order that an election should be held. A copy of this order is enclosed. In view of the effect which this new order by the NLRB would seem to have, our attorney has filed a request that the order of Temporary Injunction

> previously issued by Judge Brown in Wichita, also be vacated and dissolved. A copy of this motion is also enclosed.
>
> It is my understanding that two of you are employees and one has been self-employed in some connection with a family business. I am sending this information, since it appears these latest developments might affect your decision to disrupt the status that you have been in for over 8½ months to return to KRH on a temporary reinstatement basis set forth in the order of temporary injunction. I am also enclosing other proceedings since the court hearing in January since you were not present for these proceedings and may not have this information.
>
> Would you please advise me at your earliest convenience as to whether or not you intend to accept the offer of temporary reinstatement at KRH under the temporary injunction order by Judge Brown in view of these new circumstances.

App. 76. After receiving this letter,[2] Bishop declined Angle's offer of temporary reinstatement.

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[2]Included with it were the following enclosures:
Motion, dated January 23, 1967, with Exhibit 1.
Transcript of Hearing Held March 1, 1967.
Order Granting Temporary Injunction, dated April 5, 1967.
Memorandum, Findings of Fact and Conclusions of Law, dated April 5, 1967.
Notice of Appeal, dated April 7, 1967.
Motion to Stay Temporary Injunction Pending Appeal, dated April 7, 1967.
William L. Whittaker, Clerk, letter dated May 1, 1967, setting Denver hearing for May 24, 1967.
Transcript of Hearing held April 17, 1967.
Order Vacating Decision and Direction of Election, Withdrawing Notice of Hearing, and Permitting Withdrawal of Petition, 5-31-67.
Motion to Dissolve Injunction, dated June 1, 1967.
App. 77.

On June 25, 1969, the Board found in the unfair labor practice proceeding that, *inter alia,* Angle had discriminated against Johnson, Bishop, and Harris in violation of sections 8(a)(1) and 8(a)(3) of the Act. *George A. Angle, d/b/a Kansas Refined Helium Co.,* 176 N.L.R.B. 1032 (1969), *enf'd, Oil, Chemical and Atomic Workers Int'l Union v. NLRB,* 445 F.2d 237 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1039 (1972). The Board's decision included the customary reinstatement and make whole remedial provisions. *See* 29 U.S.C. § 160(c) (1970).

In a supplemental proceeding to calculate the amount of backpay to which the illegally discharged employees were entitled, the Board ruled, with members Fanning and Jenkins dissenting, that the refusal of the employees to accept Angle's offer of temporary reinstatement constituted a willful loss of earnings sufficient to halt the accrual of Angle's backpay liability from the time of the extension of the offer. *Kansas Refined Helium Co.,* 215 N.L.R.B. No. 67 (Dec. 15, 1974).[3] It is this ruling that is now before us.

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[3]The Board's supplemental decision might be thought to be ambiguous. It could be construed to mean either that (1) *an employer* has fully discharged any further backpay obligation *on his part* by extending an offer of temporary reinstatement pursuant to a section 10(j) order, or (2) that *the employees'* refusal to accept said offer constitutes a willful loss of earnings *on their part* sufficient to negate the employer's continuing backpay liability. Although the Board's decision could have been more clearly articulated, we believe that a fair reading necessarily leads to the conclusion that the Board relied on the willful loss of earnings doctrine.

Our conclusion rests on four principal considerations:

(1) The Board formulated the issue presented in this case as follows:

> [W]hether or not [the Respondent's] offers of reinstatement, made pursuant to an injunction obtained by the Board under Section 10(j) of the Act, were sufficient to impose a duty upon the discriminatees herein to either accept the offers or be guilty of a willful loss of interim earnings.

(Continued on following page)

II

As a general rule, the amount of backpay awarded is the difference between what the employee would have earned but for the wrongful discharge and his actual interim earnings, *Heinrich Motors, Inc. v. NLRB,* 403 F.2d 145, 148 (2d Cir. 1968). However, the employer's backpay liability may be reduced if the employee incurs a "willful loss of earnings." *Phelps Dodge Corp. v. Labor Board,* 313 U.S. 177, 200 (1941). The *Phelps Dodge* Court made it clear that the willful loss of earnings doctrine was adopted not so much to effect "the minimization of damages" but rather to encourage "the healthy policy of promoting production and employment." *Id.* at 200.

Footnote continued—

App. 5. The Board also characterized the Administrative Law Judge's decision as confronting this same issue:

> The Administrative Law Judge found that, inasmuch as the offers were limited by the language of the court order, the discriminatees were not obligated to accept them. We disagree.

App. 5. In accordance with this view, much of the Board's decision focuses on whether the discriminatees, by rejecting the offer, had sustained a willful loss of earnings, rather than whether the employer, by extending the offer, had discharged his remedial obligation. App. 5.

(2) This view is further buttressed by prior Board decisions dealing with discharge by the employer of his remedial obligation during the course of litigation, which hold that a *full* and *unconditional* offer of reinstatement to the employee's former position is required. Hydro-Dredge Accessory Co., 215 N.L.R.B. No. 5 (Dec. 1, 1974); Anderson Plumbing and Heating Co., 203 N.L.R.B. 18 (1973); Nevada Tank and Casing Co., 131 N.L.R.B. 1352, 1353 (1961); *see, e.g.,* NLRB v. Electric City Dyeing Co., 178 F.2d 980, 983 (3rd Cir. 1950) (vague and conditional offer of reinstatement insufficient); Florida Steel Corp., 214 N.L.R.B. No. 59 (Oct. 29, 1974); Georgia Hosiery Mills, 207 N.L.R.B. 781 (1973); Sports Coach Corp. of America, 203 N.L.R.B. 145 (1973) (conditioning employees' reinstatement on withdrawal of union support); Ruston and Mercier Woodworking Co., Inc., 203 N.L.R.B. 123 (1973) (offering reinstatement as new hires); Harvey Carlton d/b/a Cello-Tak Co., 143 N.L.R.B. 295, 304

(Continued on following page)

The boundaries of the willful loss of earnings doctrine have been defined in subsequent opinions. Backpay may be reduced to the extent that the employee "fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason." *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 174 n.3 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966); *accord, NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1317 (D.C. Cir. 1972). The burden of proving such willful loss of earnings is always upon the employer. *Id.* at 1318.

Footnote continued—

(1963) (probationary reinstatement insufficient). Indeed, in this case the Board made no effort to equate Angle's offer with the traditional unconditional offer, stating instead that:

> Since Respondent's offers were temporary in nature, for the duration of the litigation, we would not find them to be substitutes for the normal, permanent offer required of employees to terminate final backpay liability for 8(a)(3) violations.

App. 6. If the Board's decision rested on the first of the two possible theories—that the employer's temporary offer of reinstatement discharged his backpay obligation—it would seem inconsistent with at least the spirit of these established cases. Were the Board to lay down so novel a proposition, we would surely expect the agency's opinion to reflect some awareness of that fact as well as a more precisely articulated view of the question. The lack of any such explanation, like the language of the decision itself, points toward interpreting the decision as not resting on the first theory suggested above.

(3) Under established Board practice, after a determination that an employee has been illegally discharged, the Board's order will require the employer to offer the employee reinstatement. If, however, the employer *pendente lite* extends an offer of unconditional and permanent reinstatement which is rejected by the employee, the employer is held to have discharged his remedial obligation, and the employee's status is altered from an illegal dischargee to an unfair labor practice striker. As such, he is entitled only to a Board order requiring the employer to reinstate him if he *applies*. In the Matter of Hemp and Co. of Illinois, 9 N.L.R.B. 449, 461-463 (1938); *accord*, Anderson Plumbing and

(Continued on following page)

The discriminatee is merely required to make "reasonable efforts" to mitigate his loss of income, and only unjustified refusals to find or accept other employment are penalized under this rule. *NLRB v. Arduini Mfg. Co.*, 394 F.2d 420, 422-23 (1st Cir. 1968); *Heinrich Motors, Inc. v. NLRB, supra*, 403 F.2d at 148-49; *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966). An employee need not "seek employment which is not consonant with his particular skills, background, and experience," or "which involves conditions that are substan-

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Footnote continued—

Heating Co., 203 N.L.R.B. 18, 19 (1973); Spitzer Motor Sales, Inc., 102 N.L.R.B. 437, 453 (1953). If in the original proceeding in 1969 the Board had viewed Angle as having discharged his remedial obligation by having extended, *pendente lite*, the temporary reinstatement offer pursuant to the 10(j) order (the first theory suggested above), then the Board would only have ordered Angle to offer reinstatement *upon application*. Instead the order required Angle to offer reinstatement, thus implicitly rejecting any suggestion that Angle's temporary offer discharged his remedial obligation. And rather than indicating any disagreement with this implicit finding, the Board in the supplemental proceeding expressly noted that it would not find Angle's offers to be "substitutes for the normal permanent offer required of employers to terminate final backpay liability" and that Angle "offered unconditional permanent reinstatement to each of the discriminatees here involved, sufficient to satisfy its obligation under the terms of the Board and court orders." App. 6. Thus the Board has consistently treated the employees as having been illegally discharged, and in so doing has rejected any suggestion that Angle discharged his remedial obligation.

(4) If the Board's decision were construed to hold that a temporary offer of reinstatement on the part of an employer tolls backpay liability, this would discourage resort to the § 10(j) procedure. The Regional Director, interested in protecting employees where the employer is charged with being the offender, would realize that where success before the Board is likely, the employees would prefer that a § 10(j) order not be sought; for if, pursuant to a § 10(j) order, the employer offered temporary reinstatement, what was intended as a protective remedial provision, *see* note 1 *supra*, would instead have the peculiar effect of limiting the scope of the backpay remedy that would otherwise be available.

Therefore, we conclude that the Board's decision must be read to hold that the employees' rejection of Angle's offer constituted a willful loss of earnings.

tially more onerous than his previous position." *NLRB v. Madison Courier, Inc., supra,* 472 F.2d at 1320-21. He is not required to accept employment which is located an unreasonable distance from his home. *Id.* at 1314; *accord, e.g., Florence Printing Co. v. NLRB,* 376 F.2d 216, 220-21 (4th Cir. 1967), *cert. denied,* 389 U.S. 840 (1967); *NLRB v. Mastro Plastics Corp.,* 354 F.2d 170, 179 (2nd Cir. 1965); *General Teamsters Local 439,* 194 N.L.R.B. 446, 451 (1971); *Nickey Chevrolet Sales, Inc.,* 160 N.L.R.B. 1279, 1280 (1966); *Oman Construction Co., Inc.,* 144 N.L.R.B. 1534, 1537-38 (1963); *American Bottling Co.,* 116 N.L.R.B. 1303 (1956). Efforts at mitigation need not be successful; all that is required is an "honest good faith effort," *NLRB v. Cashman Auto Co.,* 223 F.2d 832, 836 (1st Cir. 1955); *accord, NLRB v. Nickey Chevrolet Sales, Inc.,* 493 F.2d 103, 108 (7th Cir. 1974); *Golay & Co. v. NLRB,* 447 F.2d 290 (7th Cir. 1971); *Lloyd's Ornamental and Steel Fabricators, Inc.,* 211 N.L.R.B. 217 (1974).

Our task is to review the Board's application of these well-established principles to the supplemental decision and order of the Board in the present case.[4] The parties have stipulated as to all questions of backpay liability except the effect of the employees' rejection of Angle's offer of temporary reinstatement under the willful loss of earnings doctrine. *See* Exhs. 2A-2C, 3A-3C, App. 130-57. In properly applying this doctrine, the facts concerning each discriminatee must be considered separately. *NLRB v.*

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[4]While the Board, in its adminstration of the Act, has broad discretion in shaping remedies, we have held (in the context of a backpay case) that it "cannot act arbitrarily nor can it treat similar situations in dissimilar ways. The Board has a responsibility to administer the Act fairly and rationally." Burinskas v. NLRB, 357 F.2d 822, 827 (D.C. Cir. 1966), *citing* Melody Music Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965); *accord, e.g.,* Columbia Broadcasting System, Inc. v. FCC, 454 F2d 1018, 1026 (D.C. Cir. 1971); Carnation Co. v. NLRB, 429 F.2d 1130, 1134-1135 (9th Cir. 1970); NLRB v. WGOK, Inc., 384 F.2d 500, 503 (5th Cir. 1967).

Madison Courier, supra, 472 F.2d at 1318; *see NLRB v. Rice Lake Creamery Co.,* 365 F.2d 888, 894 (D.C. Cir. 1966); *United States Air Conditioning Corp.,* 141 N.L.R.B. 1278, 1280 (1963).

At the time that Angle extended his temporary offer of reinstatement, both Johnson and Harris had left the community, moving several hundred miles away to secure employment. Johnson had obtained work at the Johnson Service Company in Carrollton, Texas, and during the second quarter of 1967, up to the time of Angle's reinstatement offer, had earned $1,107.77 in his new job as opposed to the $804.95 he would have earned for this quarter at KRH.[5] Harris was employed by Boeing Aircraft Company in Seattle, Washington. In the second quarter of 1967, up to the time of Angle's offer of reinstatement, he earned $1,977.84, compared with a calculated $1,077.09 total earnings for the same period had he worked for Angle.[6]

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[5]Johnson finished that quarter with earnings totaling $2,637.54 at his Texas job compared to calculated earnings of $1,944.52 that he would have received at Angle's plant. Johnson earned more money per quarter at his new job in 18 of the possible 23 quarters of backpay liability than he would have earned working for Angle, and in several quarters significantly more:

Year/Quarter	KRH	Texas
1969—3rd	$2,392.53	$3,165.00
1970—4th	2,210.13	3,049.54
1971—4th	2,449.38	3,614.00

App. 141-43

Johnson's claim for backpay arises from the 5 quarters in which his interim earnings fell short of the sum he would have earned at KRH. It is standard Board practice to calculate backpay independently for each quarter. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); NLRB v. Rice Lake Creamery Co., 365 F.2d 888, 891 (D.C. Cir. 1966); NLRB v. Brown and Root, Inc., 311 F.2d 447, 452 (8th Cir. 1963).

[6]Harris finished that quarter earning $3,596.08 at his Seattle job as opposed to a comparable $1,958.38 total earnings at the KRH plant. In 12 out of the 23 possible quarters of backpay liability, Harris earned more than he would have earned working for Angle—on the average $400 or $500 more per quarter.

Therefore we are at a loss to understand the Board's decision that Johnson's and Harris's refusal to accept Angle's temporary offer of reinstatement constituted a willful loss of earnings when both men at the time of the offer were earning *more* money at their new jobs than they would have earned for a comparable period of time at KRH. If ever the public policy first enunciated by the *Phelps Dodge* Court of encouraging employment and productivity of workers was furthered, this is the case.

The Board in the instant case found that, since Angle carefully followed the court's order, "we see no reason not to give these offers of reinstatement the same status as any other valid, interim offer." App. 5. An unreasonable rejection of a valid, interim offer might in some circumstances constitute a willful loss of earnings. But even if Angle's offer were considered as such,[7] Johnson and Harris could both have refused the offer and not incurred a willful loss of earnings. Aside from the *temporary* character of the offer as opposed to their present permanent employment, and the fact that the offer paid *less* than their present employment and involved tension-filled working conditions, an employee is not required to accept employment at a great distance from his home. *See* p. 12 *supra*.[8] Acceptance of Angle's offer would involve a relocation of

[7]We have already noted that the purpose of § 10(j) might be undercut if a discharged employee's refusal of an offer of temporary reinstatement is found to constitute a willful loss of earnings. *See* the last paragraph of note 3 *supra*.

[8]In Florence Printing Co. v. NLRB, *supra*, 376 F.2d at 221, Glenn Johnson received an offer of a *permanent* job at his trade in Rock Hill, South Carolina, one hundred miles from Florence. The court affirmed the Board's determination that Johnson's refusal to accept this offer did not constitute a forfeiture of his backpay reimbursement—the disruptive effect of the move and the necessity of selling his home, removing his child from school, and abandoning his native community were a sufficient basis for finding that his refusal was not unreasonable.

several hundred miles—the second such uprooting in a period of eight months.

Therefore, we find that Johnson and Harris did not incur a willful loss of earnings, as defined by existing NLRB doctrine, by their rejection of Angle's offer of temporary reinstatement. As members Fanning and Jenkins noted in dissent,

> [I]t would be unreasonable to require these men to abandon their permanent jobs and newly established lives, to return to an employer on a limited basis, at the risk of ultimately being without any employment and having to renew their residences at distant locations. . . . Johnson and Harris made substantial earnings during all four quarters of 1967. The public interest does not require more of them.

App. 9-10.

Bishop's situation is not as clear. At the time of Angle's offer of temporary reinstatement, Bishop was employed by Cessna Aircraft in Wichita, Kansas, approximately 100 miles from the KRH plant. His second quarter 1967 earnings preceding the offer were $582.86 at his new job, compared to projected earnings of $857.89 at Angle's plant.[9]

Initially Bishop accepted Angle's April 25, 1967 offer. He then received Angle's June 9, 1967 letter (reproduced in its entirety at pp. 4-5 *supra*) informing him that the Union had withdrawn its request for an election at KRH, that Angle's attorneys had filed for dissolution of the § 10

[9]Bishop finished the second quarter of 1967 earning $1,421.62 in contrast to $2,086.38 at the KRH plant. In the remaining quarters he earned considerably less at his new job, finally earning higher wages for the first time in the third quarter of 1970—$1,316.17 in contrast to a calculated $999.81 from Angle.

(j) injunction, and that Angle was so informing him "since it appears these latest developments might affect your decision to disrupt the status that you have been in for over eight and one-half months to return to KRH on a temporary reinstatement basis." Copies of papers in the pending legal proceedings were enclosed.[10] Clearly implicit in the June 9 letter was the message that the offer was to a temporary position and extended only for the life of the then-under-challenge § 10(j) order. Thus faced with the possibility that the injunction would soon be vacated and that Angle would discharge him for the second time, Bishop declined to return to KRH.

If Angle's temporary offer of reinstatement is treated, as the Board suggests, like any other valid interim offer, we find that Bishop was under no obligation to accept this offer. As noted above, an employee is only required to make *reasonable* efforts to obtain alternative employment. In Bishop's case he promptly sought and obtained interim employment. When Angle's offer was extended, Bishop had to choose between a lower paying *permanent* job and a higher paying job with Angle which was so temporary in character that, if Angle succeeded in vacating the § 10 (j) injunction, the job might have been gone by the time Bishop moved back to Otis. Moreover, acceptance of Angle's interim offer would have entailed a one hundred mile relocation, the second such move within eight months. If an employee does not incur a willful loss of earnings by refusing to move one hundred miles to accept an offer of permanent employment, *Florence Printing Co.* v. *NLRB, supra,* we cannot understand how Bishop could be found to have incurred a willful loss of earnings by refusing to leave his permanent job and move one hundred miles for

[10]In fact the § 10(j) injunction was affirmed on appeal on August 28, 1967. Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967).

the second time to accept temporary employment. We believe that under prior Board decisions it cannot be thought that Bishop acted unreasonably in choosing to remain in Wichita rather than accepting Angle's offer. We therefore hold that Bishop did not incur a willful loss of earnings.

The order of the Board is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 17-CA-3021,
17-CA-3021-2, and
17-CA-3378

KANSAS REFINED HELIUM COMPANY, A
DIVISION OF ANGLE
INDUSTRIES, INC.

and

OIL, CHEMICAL, AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

(Date of Decision: December 10, 1974)

On June 25, 1969, the National Labor Relations Board issued Decisions and Orders in the above-entitled proceedings,[1] finding that the Respondent had discriminated against Russel L. Bishop, John Harris, Russell Sims, Arel Rodgers,

[1]*George A. Angle d/b/a Kansas Refined Helium Company,* 176 NLRB 1032 (Cases 17-CA-3021; 3021-2); *George A. Angle, d/b/a Kansas Refined Helium Company,* 176 NLRB 1037 (Case 17-CA-3378).

Dwayne Johnson, and Thomas Garrett in violation of Section 8(a)(1), (3), and (5) of the Act, and directing that the Respondent make the discriminatees whole for any loss of pay suffered as a result of said violations.

On October 10, 1973, the Regional Director for Region 17 issued a backpay specification and notice of hearing, to which the Respondent duly filed an answer. A hearing was held before Administrative Law Judge Joel A. Harmatz on February 26 and 27, 1974, for the purpose of determining the amount of backpay due the discriminatees. On April 23, 1974, Administrative Law Judge Harmatz issued the attached Supplemental Decision, in which he found that the discriminatees[2] were entitled to the following payments, upon which interest was to accrue at 6 percent per annum until paid, computed on the basis of the quarterly amounts of net backpay due, less any tax withholding required by law; Dwayne A. Johnson, $974.90; Russell Bishop, $8,828.40; John Harris, $13,583.20. Thereafter Respondent filed exceptions to the Administrative Law Judge's Supplemental Decision and a supporting brief. Counsel for the Regional Director filed an answering brief.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith.

The illegal discharges herein occurred in September 1966. Thereafter, in November 1966, the Regional Director issued the original complaint in this case. However, before the matter was heard by the Board, the General Counsel petitioned the district court in Kansas for a temporary injunction seeking various forms of relief, including an order to reinstate the six dischargees pending final determination of the matter by the Board. On April 5, 1967, the district court granted the petition, which was affirmed on an appeal by the Tenth Circuit Court of Appeals on August 28, 1967.

[2]Rodgers and Sims were dropped from the instant specification by an all-party agreement upon payment of specified sums, pending final determination of liability in related litigation, and Garrett accepted a fixed sum in full satisfaction of his claim.

In the interim period, not having been successful in seeking a stay of the order pending appeal, Respondent, on April 25, 1967, wrote a letter to each of the six discriminatees offering him reinstatement to his former position. The letters made it clear that the offer was pursuant to the court order and was made "pending the final determination of this matter by the Board." None of the discriminatees involved here accepted the offer. Thus, at this stage of the proceedings, Respondent has raised the issue of whether or not its offers of reinstatement, made pursuant to an injunction obtained by the Board under Section 10(j) of the Act, were sufficient to impose a duty upon the discriminatees herein to either accept the offers or be guilty of a willful loss of interim earnings.

The Administrative Law Judge found that, inasmuch as the offers were limited by the language of the court order, the discriminatees were not obligated to accept them. We disagree.

There is no contention that Respondent did not fully comply with the district court's order to offer these men reinstatement, *pendente lite*. Respondent having been careful to follow the court's order exactly, we see no reason not to give these offers of reinstatement the same status as any other valid, interim offer. Though it is true that, should Respondent have prevailed before the Board, the alleged discriminatees' reinstatement would in all likelihood

have come to an end, that would have been an implied risk regardless of whether or not Respondent expressly so stated. Moreover, while the discriminatees would have been "taking a chance" in accepting Respondent's interim offer, depending on the outcome of the litigation, so also was Respondent, in the sense that, pursuant to the court's order, it was being required to do something which, ultimately, the Board or courts might find it had not had an obligation to do. Since Respondent offered interim employment to these employees, to their old jobs and at their old rates, at the express request of the Board under Section 10(j), we are hard-pressed to say this was not satisfactory, equivalent interim employment, sufficient to toll Respondent's backpay liability during this period.

Since Respondent's offers were temporary in nature, for the duration of the litigation, we would not find them to be substitutes for the normal, permanent offer required of employers to terminate final backpay liability for 8(a)(3) violations. Respondent was apparently of this view also, since, shortly after the Supreme Court denied *certiorari* in this case, Respondent concededly offered unconditional permanent reinstatement to each of the discriminatees here involved, sufficient to satisfy its obligations under the terms of the Board and court orders.

Remedy

The parties have stipulated to Respondent's backpay liability, should the Board find the April 15, 1967, offers to have constituted valid, interim offers. The amounts awarded below are in accordance with that stipulation.

ORDER

Upon the basis of the foregoing, it is ordered that the Respondent, Kansas Refined Helium Company, a Division

of Angle Industries, Inc., Wichita, Kansas, its officers, agents, successors, and assigns, shall pay to the employees involved in this supplemental proceeding, in the manner described in the attached Supplemental Decision, the amount set forth opposite their names below:

Dwayne A. Johnson	$ 527.87
Russell Bishop	2,650.80
John Harris	2,297.46

Dated, Washington, D.C., December 10, 1974.

Edward B. Miller, Chairman
Ralph E. Kennedy, Member
John A. Penello, Member
(Seal) National Labor Relations Board

MEMBER FANNING and MEMBER JENKINS, dissenting:

Contrary to the majority, we agree with the Administrative Law Judge, for the reasons stated in his Decision, that Respondent was not relieved of its backpay liability for the period during which it had offered temporary reinstatement to discriminatees Bishop, Johnson, and Harris pursuant to a court injunction.

Admittedly, this Respondent was obligated at all times to offer these discriminatees unconditional and full reinstatement to their previous jobs and to make them whole for all losses sustained as a consequence of Respondent's unfair labor practices, less interim earnings. With respect to the latter provision, the law requires that the discriminatees themselves make an honest effort to find interim employment. If they deliberately refuse to make such an effort or make an inadequate effort, the offending employer, here the Respondent, despite its wrongdoing, is relieved of backpay liability. Obviously, the purpose of

this qualification upon the discriminatees' right to backpay is not to ameliorate the wrongdoer's obligations, but in the public interest to encourage all able-bodied workmen to work rather than loaf.

Contrary to the majority, the Respondent's offer of temporary court-ordered employment is not entitled to the same consideration as "any other valid offer." The fact of the matter is that such an offer, coming from this Respondent, is *not* a valid offer and until this date has never been considered such by the Board. The only valid offer this Company, as distinguished from other companies, could offer these discriminatees was *unconditional, permanent* reinstatement to the jobs from which they had been unlawfully discharged. To hold, as the majority does, that a lesser offer can operate to reduce the Respondent's backpay liability defeats the whole purpose of the Board's historic remedial order requiring reinstatement with full backpay where, as here, an employer has been found to have committed unfair labor practices going to the heart of the statute. The issue of a willful loss of earnings cannot and should not be attached to an offer of employment from a wrongdoing respondent. No employee who has been the object of loss of his job and livelihood in violation of Federal law to such an extent that a judge would require reinstatement *pendente lite* should be forced to accept such employment against his will or lose backpay. That rule operates to encourage discriminatees to accept reasonable offers of interim employment. It should not be used, as the majority uses it here, to coerce them into accepting a job with an unwilling employer and submitting to the psychological strains implicit in the carefully calculated terms of the Respondent's offer.

It is clear, as a matter of law, from the numerous cases decided by this Board and the courts, see, e.g., *J. H. Rutter-*

Rex Manufacturing Company, Inc., 206 NLRB No. 80 (1973); *Phelps Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177, 197-200 (1941), that it is the obligation of Respondent to offer full, permanent, and unconditional reinstatement to these discriminatees. If, as the majority here holds, this were not the case, then the risk of accepting interim offers would, and does in this case, fall on the innocent employees rather than the guilty employer. Regardless of the reason why the Respondent made these offers, the majority's decision in this case serves to shift the risk of accepting tenuous employment to the discriminatees, who, by virtue of having been discharged initially for exercising rights which this Board has been entrusted with the duty of protecting, are already understandably uncertain in their employment status and therefore less likely to accept thus undermining the essential nature of the Board's remedial power. By cutting off Respondent's backpay liability as of the date these conditional offers were refused, the majority has taken a principle developed to require fairness from discriminatees in seeking interim employment and turned it into a rule that effectively discourages violators of the Act from providing a full remedy. A wrongdoing employer may choose to litigate to the end without reinstating the employee, and assume the risk of full reimbursement if he loses and no reimbursement if he wins. Or he may eliminate his losses, and his and employee's risk, by offering full and unconditional reinstatement to the employee. But we do not think the wrongdoer can or should have it both ways, and if he chooses not to reinstate the employee, unconditionally, then he must bear the consequences and pay the employee for lost wages. To hold otherwise would be to frustrate the "make whole" remedy the Act establishes.

Moreover, the record shows, as the Administrative Law Judge pointed out, that both Johnson and Harris

were gainfully employed at the time of Respondent's offer of April 25, 1967. At that time Johnson had moved to Carrollton, Texas, and Harris was living in Seattle, Washington. While the court did include a requirement in its injunctive order that Respondent recompense these men for travel costs as part of the interim offer of reinstatement, from our standpoint it would be unreasonable to require these men to abandon their permanent jobs and newly established lives, to return to an employer on a limited basis, at the risk of ultimately being without any employment and having to renew their residences at distant locations. It is therefore clear, even under the majority's view of this case, that they were not incurring willful losses by refusing to accept the Respondent's legally phrased offer. Johnson and Harris made substantial earnings during all four quarters of 1967. The public interest does not require more of them. Nor was their conduct such as to warrant an impingement upon the effectiveness of the Board's remedial order addressed to this Respondent. With respect to Bishop, he did, indeed, initially accept Respondent's April 25 offer. Thereafter, however, Respondent sent the discriminatees another letter on June 9, 1967, gratuitously informing them that it had filed a request that the order of temporary injunction be vacated and dissolved. Treading on the verge of contempt of court, Respondent attempted to dissuade the discriminatees from accepting reinstatement by suggesting that they might not want to "disrupt the status that you have been in for over 8-1/2 months to return to KRH on a temporary reinstatement basis set forth in the order of temporary injunction." Faced with the possibility that the injunction would soon be vacated and the Respondent would then discharge him a second time, Bishop declined the offer. In the circumstances it seems to us, far from incurring a willful loss, he acted as a prudent working man. It

was apparent to him that Respondent's offer was not made in good faith, that it would be retracted as soon as legally feasible, and that, if he accepted, he would be precluded from seeking desirable employment with a willing employer.

In our opinion, none of these discriminatees incurred any willful loss of earnings by rejecting Respondent's reluctant offers of interim employment. We believe, on the contrary, that these employees acted reasonably and properly in their own interest and for their own security. We would not hand this Respondent a bonanza which does not benefit the public and which impairs the effectiveness of the Board's remedy in this case.

Dated, Washington, D.C., December 10, 1974.

John H. Fanning, Member
Howard Jenkins, Jr., Member
National Labor Relations Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case Nos. 17-CA-3021
17-CA-3021-2
17-CA-3378

KANSAS REFINED HELIUM COMPANY, A DIVISION OF ANGLE INDUSTRIES, INC.

and

OIL, CHEMICAL, AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

John P. Hurley, Esq. and
William Bevan, Esq., of
Kansas City, Kansas, for the
Regional Director.

Arthur Frederick, of Hutchinson,
Kansas, for the Union.

Rodney H. Burey, Esq., of
Arvin, Arvin, Burey and Thomas,
of Wichita, Kansas for discriminatee
Rodgers.

Marvin J. Martin, Esq., and
W. Stanley Churchill, Esq.,
of Wichita, Kansas, for the
Respondent.

SUPPLEMENTAL DECISION

(Date of Decision: April 23, 1974)

Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: This is a supplemental backpay proceeding involving determination of the amounts of backpay due under a Board Decision and Order dated June 25, 1969, wherein the Board found that Respondent[1] discriminated against Russell L. Bishop, John Harris, Russell Sims, Arel Rodgers, Dwayne Johnson and Thomas Garrett in violation of Section 8(a)(1), (3) and (5) of the Act,[2] and a Decision and Order issued by the Board on June 25, 1969, finding that Respondent had engaged in further discrimination against

[1]The name of Respondent as set forth in the caption appears as amended at the supplemental hearing.

[2]*Russell A. Angle d/b/a Kansas Refined Helium Company*, 176 NLRB 1032 (Case No. 17-CA-3021 and 17-CA-3021-2).

Arel Rodgers in violation of Section 8(a)(1), (3) and (4) of the Act.[3] Said Orders included the customary reinstatement and make whole remedial provisions. On September 10, 1971, the United States Court of Appeals for the District of Columbia entered its Decree enforcing the respective Orders of the Board in their entirety. On January 17, 1972, the United States Supreme Court denied Respondent's petition for a writ of certiorari.

Subsequent to the issuance of the Board's Orders and the entry of the court decree, the Regional Director for Region 17 on behalf of the Board and pursuant to Section 102.52, *et seq.* of the Board's Rules and Regulations, Series 8, as amended, issued on October 10, 1973 a Backpay Specification and Notice of Hearing, setting forth therein the computation of gross backpay due to Bishop, Harris, Sims, Rodgers, Johnson and Garrett, as well as admissions of interim earnings, and the net backpay allegedly due to said discriminatees. An answer to the Backpay Specification was duly filed by the Respondent on November 9, 1973, and followed by an amendment thereto dated December 14, 1973.

Pursuant to notice, the supplemental hearing was held before the undersigned in Wichita, Kansas on February 26 and 27, 1974, for the purpose of determining the amount of backpay due to the discriminatees.

Upon the entire record in this case, including observation of the witnesses and their demeanor while testifying, and after careful consideration of the post hearing briefs, I make the following:

[3]*George A. Angle d/b/a Kansas Helium Company*, 176 NLRB 1037 (Case No. 17-CA-3378).

I. Findings of Fact

A. *Accommodations Made at the Hearing*

In the course of the hearing, a variety of agreements were reached on the part of counsel for the Regional Director and the Respondent which narrowed to a single question the multitude of issues that had existed on the face of the pleadings. Prior to a definition of that issue, it might be helpful to outline the matters removed from present controversy as a result of these amicable dispositions.

First with respect to Arel Rodgers and Russell Sims, it is noted that an accord was reached which provided the basis for my granting a motion by Respondent to drop them from the instant litigation without prejudice. In this regard, I note that the allegations in the specification relative to Rodgers and Sims were at all times of an interim nature. Thus, it was the position of the Regional Director that a complete and final determination of the amounts due them would be inappropriate at this time in view of certain presently pending collateral litigation. For it was asserted that a civil contempt proceeding against Respondent involves issues relative to Rodgers and Sims the determination of which, could conceivably affect the amounts ultimately due them. In consequence, it was the expressed intention of the Regional Director to issue a further supplemental backpay specification, following disposition of the contempt proceeding, pursuant to which any remaining amounts due Rodgers and Sims, not asserted under the instant specification, would be claimed. Respondent objected strenuously to the dual litigation that would result from the procedure that the Regional Director elected to follow. After Respondent's objection was overruled and its motion to strike Sims and Rodgers was denied,

an all party agreement was reached whereby Sims and Rodgers would be dropped from the instant specification upon relatively immediate payment of certain specified sums, consisting of both interest and principal. This agreement, in my judgment effectuated statutory policies, by providing some economic relief to the discriminatees, while at the same time enhancing the administrative process by avoiding two separate hearings to determine the amounts due the same individuals. Pursuant thereto, I granted Respondent's unopposed motion to sever Rodgers and Sims, both of whom stated their assent to this consequence on the record, from the instant specification, a ruling which leaves the entire backpay claim of Rodger and Sims to resolution through a single supplemental specification, if necessary, and litigation at a single hearing at a time when all relevant facts are available.

Secondly with respect to Thomas Garrett it was agreed at the hearing that Garrett would be paid a fixed sum consisting of principal and interest in *full* satisfaction of his backpay claim. Garrett stated for the record his assent to this arrangement which disposed of all issues relative to his claim. Finally with respect to the remaining discriminatees, Bishop, Harris, and Johnson, the parties at the hearing reached full agreement on the mechanics of computing their net backpay within the backpay period asserted by the Regional Director. However, the Respondent in entering these stipulations preserved its position that, contrary to the Regional Director, the backpay cutoff date for all three was in the spring of 1967, when the Company allegedly offered them reinstatement, rather than, February 1, 1972, as alleged in the specification as to Johnson, August 21, 1970, as alleged as to Bishop, and February 16, 1972 as alleged as to Harris. Accordingly the sole remaining issue in this supplemental litigation is whether

a valid offer of reinstatement was made so as to terminate any and all backpay obligations as of the second quarter in 1967.

In the interest of expediting this determination, the parties agreed to submit documents evidencing their agreement as to the specific amounts that would be due Johnson, Bishop, and Harris under either cutoff date or dates. Pursuant thereto, after close of the hearing, said documents were forwarded to the undersigned and marked Joint Exhibit 2(A-C) and 3(A-C); they are hereby received in evidence and made a part of the record.

Accordingly, there being no dispute as to the net amounts due, other than that which turns upon the propriety of Respondent's 1967 offer of reinstatement, I shall confine myself below to this limited question, which is the sole matter in controversy at this time.

B. *Concluding Findings*

The issue as to the validity of the 1967 offers of reinstatement herein presents a legal question somewhat novel to the administration of Board backpay remedies.

The undisputed facts show that following the filing of charges in Case 17-CA-3021 and Case 17-CA-3021-2 in September 1966, and the issuance of a complaint thereon, a proceeding was instituted in the United States District Court for the District of Kansas by the Regional Director pursuant to Section 10(j) of the Act.[4] The petition in

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[4]Section 10(j) of the Act is designed to allow the Board to secure interim relief with respect to alleged unfair labor practices prior to a determination of their merits, and provides as follows:

> (j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any

(Continued on following page)

said 10(j) proceeding alleged *inter alia* that there was reasonable cause to believe that Arel Rodgers, Russell Sims, Dwayne Johnson, Russell Bishop, John Harris and Thomas Garrett had been discharged on September 20, 1966 in violation of Section 8(a)(3) and (1) of the Act. By way of relief, the 10(j) petition included the prayer set forth below requesting that the court issue an Order:

> (iii) Directing the respondent to reinstate the six discharged employees pending the final determination of this matter by the Board.

On April 5, 1967, the District Court issued an injunction, which, *inter alia*, ordered the employer to reinstate the six dischargees pending a final disposition of the issues by the Board, and ordered the employer to tender sufficient transportation costs to permit the dischargees and their families to return to work.

A motion by Respondent to stay the temporary injunction pending appeal was denied by the District Court on April 24, 1967.

On May 3, 1967, the United States Court of Appeals for the Tenth Circuit entered an Order denying Respondent's motion to stay the injunction pending appeal.

Footnote continued—

> person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Thereafter, the Respondent sought review of the temporary injunction in the Tenth Circuit Court of Appeals. On August 28, 1967, said court issued its decision, denying the appeal, and affirming the District Court's Order, with a minor modification to the transportation expense provision thereof.

In the interim, Respondent, by identical letters dated April 25, 1967, and over signature of George A. Angle, wrote each of the six discriminatees, including Johnson, Bishop and Davis, stating as follows:

> Judge Brown has now ruled that you are to be offered reinstatement to your former position pending the final determination of this matter by the Board; and that we are to pay transportation costs sufficient to enable you and your family to return to work, if you accept reinstatement to your former position pending the final determination of this matter by the Board.
>
> In order for the employees and their families to make their plans and in order for me to make the necessary arrangements regarding the present personnel at the KRH plant, and to expedite Judge Brown's temporary injunction, will you please let me know if you desire to return to work pending the final outcome of this KRH matter. If so, please calculate transportation costs sufficient to enable you and your family to return to work. In case you do not desire to return to work pending the final outcome of the KRH matter before the NLRB, it is not necessary that you calculate these transportation costs. In either event, will you complete the attached information and return it to me in the enclosed envelope.

Each of said letters contained the following questionnaire as an attachment:

To: KANSAS REFINED HELIUM COMPANY
1720 Wichita Plaza
Wichita, Kansas 67202

1. I will accept reinstatement to my former position pending the final determination of this matter by the Board. Check one.

   Yes .....

   No .....

2. (If the answer to No. 1 is Yes)

   Transportation costs sufficient to enable me and my family to return to work are $..... Such costs are computed as follows:

   .....

   .....

   .....

Dated this ..... day of ....., 1967.

.....
Signature

On May 3, 1967, identical letters, over the signature of George Angle were sent to Johnson, Davis and Bishop, stating as follows:

> This will confirm that you are offered immediate reinstatement to your former position pending the final determination of this matter by the NLRB.
>
> A check for transportation costs claimed in your letter of April 31, 1967, is enclosed. If you are not accepting temporary reinstatement as outlined above,

this check is not to be cashed and instead is to be returned immediately to me.

Respondent contends that these offers of reinstatement, pursuant to the District Court's 10(j) Order were adequate to toll backpay, arguing that they were valid offers and sufficient to impose a duty upon the discriminatees to either accept them or be guilty of a willful loss of earnings.[5] The General Counsel, in asserting the inadequacy of said offers points to the fact that they were to temporary positions, and hence failed to qualify under statutory remedial policy as imposing any duty of acceptance on the discriminatees. I find merit in the General Counsel's position.

Concededly, the jobs offered by Respondent in the above correspondence were identical to those held by the discriminatees prior to their discharge, and hence the offers quite clearly cannot be faulted on that ground. On the other hand, considering the total circumstances surrounding these offers, a serious question exists as to whether the duration of the employment offered was such as to render them deficient and to relieve the discriminatees of any obligation to accept and return to the employment from which they had been unlawfully terminated some 8 months earlier. In its brief, Respondent argues that there should be "no concern in the instant case about the duration of the offer . . ." since it would protect the discriminatees "throughout the entire proceedings until the matter was 'finally determined' by the Board." I do not ascribe to this interpretation of the evidence.

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[5]In accordance with well established principle, discriminatees, who reject *invalid* offers of reinstatement, cannot, for that reason, be said to have incurred a willful loss of earnings. *Leeding Sales Co., Inc.*, 155 NLRB 755, 757. Therefore, the sole issue for decision is whether or not the offers were valid.

It is true that, by virtue of their terms, the offers incorporated the language of the District Court, by reciting that reinstatement was offered "pending the final determination of this matter by the NLRB." However, the offer also suggested to the discriminatees that these offers were not being offered voluntarily but, rather, were effected by Respondent in order to comply with the District Court Order. This, in my opinion, is the vice in Respondent's position; for it is apparent that immediately after issuance of the 10(j) Order, Respondent sought its stay at both District Court and appellate levels, while all the time seeking its dissolution through an appeal to the Tenth Circuit.

The evidence further establishes that Respondent intended its offers to be viable only so long as the 10(j) Order remained in effect, and I am satisfied that through Respondent's communication with the discriminatees, the latter were led to believe that the offers would be withdrawn if Respondent's challenge to said Order proved successful. Indeed, this additional limitation on the duration of the offers explicitly appeared in a letter sent to Bishop, Garrett and Rodgers on June 9, 1967, again over signature of George A. Angle, advising as follows:

> In my last letter to you dated May 25, 1967, I told you I was going to the KRH plant. Following my return from the plant, I received a copy of an order from the NLRB indicating that the Union has withdrawn its request for an election and vacating the original order that an election should be held. A copy of this order is enclosed. In view of the effect which this new order by the NLRB would seem to have, our attorney has filed a request that the order of Temporary Injunction previously issued by Judge Brown in Wichita, also be vacated and dissolved. A copy of this motion is also enclosed.

It is my understanding that two of you are employees and one has been self-employed in some connection with a family business. I am sending this information, since it appears these latest developments might affect your decision to disrupt the status that you have been in for over 8 1/2 months to return to KRH on a temporary reinstatement basis set forth in the order of temporary injunction. I am also enclosing other proceedings since the court hearing in January since you were not present for these proceedings and may not have this information.

Would you please advise me at your earliest convenience as to whether or not you intend to accept the offer of temporary reinstatement at KRH under the temporary injunction order by Judge Brown in view of these new circumstances.

Any ambiguity that may have existed as to the Company's intention to retract the offers upon elimination of the 10(j) injunction was erased by this letter, which in plain terms called upon discriminatees to consider the risk of the Company's new grounds for challenging the 10(j) Order before disrupting their interim employment and returning to their former jobs. Clearly implicit in such admonition was the message that the offers were to temporary positions and coextensive in duration with the life of the, then, under challenge, 10(j) Order.

The General Counsel concedes in his brief that Board precedent does not treat squarely with the circumstances presented here. However, common sense and an appreciation for the considerations underlying the conventional remedy for unlawful discharges lead to the conclusion that the discriminatees were under no obligation to respond to the offers involved here.

Under the statutory remedial scheme, backpay and reinstatement remedies familiar to unlawful discharge cases are designed both to redress the losses incurred by victims of discrimination, and at the same time to erase the effects of the unfair labor practice. The purpose of reinstatement is the "restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."[6] An offer of reinstatement to those victimized by discrimination has been described as "the only sanction which prevents an employer from benefiting from his unfair labor practices through discharges which may weaken or destroy a union . . ."[7] and ". . . is not only the final achievement of the Act's protection in respect to the [discharged] employee but is the most realistic and articulate demonstration of the Act's protection to other employees."[8] Backpay, at the same time, in addition to saving whole the employees, operates as a means whereby wrongdoers are encouraged to make genuine offers of reinstatement, by abating additional backpay liability when such an offer is made. However, the achievement of statutory objectives requires that such an offer be "immediate and full," and it is only when it is ". . . not possible to restore the absolute *status quo*" that something less is permitted.[9] It would clearly be inconsistent with this scheme, were the Board to cut off backpay, on the basis of an unanswered reinstatement offer which lacks guarantees that tenure of employment will not be curtailed by the same considerations leading to the original terminations. Discriminatees can hardly be expected to abandon their

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[6]*Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194.

[7]*Local 833, International Union, UAW [Kohler Co.]* v. *N.L.R.B.*, 300 F. 2d 699, 703 (C.A. D.C.).

[8]*Burnup and Sims, Inc.*, 157 NLRB 336.

[9]*The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827, 829.

interim endeavors,[10] and return to an offending employer, pursuant to offers of reinstatement made under circumstances which suggest that, upon acceptance, and a return to work, the discriminatees might suffer further job dislocation for reasons other than just cause.

Here the offers were neither unconditional, nor guarantees of employment unfettered by the causative influence of the original discharges. They were made pursuant to court order and dependent upon the continuing viability of that Order. At the same time, the Respondent was actively seeking a dissolution of the court order. Discriminatees, if required to accept reinstatement under such conditions, perforce would also be required to accept the risk that Respondent's efforts to overturn the 10(j) injunction might prove fruitful. For, the discriminatees were on notice that dissolution of the court order would again result in their termination.[11] The termination of backpay cuts too

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[10]Johnson and Harris had substantial interim earnings in all four quarters of 1967. Harris had then left the Wichita area and was then gainfully employed in Seattle, Washington.

Bishop initially accepted the offer, but apparently was persuaded by the risks defined in Angle's letter of June 9, 1967 (set forth in the above text) and on the basis thereof, he apparently reconsidered. Bishop, on cross examination by Respondent's counsel, testified that in June of 1967, he "declined temporary reinstatement."

[11]The fact that this infirmity in the offers related to Respondent's legitimate efforts to overturn the 10(j) injunction lends no solace to the Respondent's position. Offers of reinstatement, where made by employers seeking to defend the validity of discharges in a subsequent Board proceeding, are always under protest. The fact that the form of protest involved here consisted of an effort to overturn 10(j) injunction should in no sense be construed as requiring the discriminatees to disrupt their interim employment and accept offers of reinstatement which might well be rescinded long in advance of a Board determination of the merits of their cause. Whatever the nature of the protest, the offer made, under such conditions, to qualify as valid and genuine, must be free of express or implied reservations upon restoration of the *status quo*. The fact that the offers

(Continued on following page)

deeply into the remedial formula in discharge cases to permit a wrongdoing employer to impose such conditions of risk upon discriminatees and then claim that, in failing to assume such risks, the discriminatees forfeited further rights to reimbursement. Offers which, as here, through implicit conditions, express less than an employer's willingness to restore the *status quo ante*—at least until the discharge issues are resolved on the merits—do not effectuate statutory remedial objectives, and hence cannot fairly be construed as imposing a duty of acceptance upon discriminatees.

For the above reasons, as the offers of reinstatement in the spring of 1967 did not constitute genuine unconditional offers of reinstatement, made in good faith, and since no further valid offers were made prior to the cutoff dates alleged in the specification, I find that the amounts of backpay due are as claimed by the General Counsel and as set forth in Joint Exhibit 3(A-C).

RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions, it is Ordered that the Respondent Kansas Refined Helium Company, a Division of Angle Industries, Inc., Wichita, Kansas, its officers, agents, successors and assigns, shall pay to the employees involved in this supplemental proceeding, as net backpay,[12] the amounts set forth opposite their names.

Footnote continued—

herein were subject to recision in the event the injunction was dissolved renders them no less conditional than would be the case where offers are subject to defeasance on other contingencies.

[12]Interest is to be added at the rate of 6 percent per annum on the respective amounts of backpay due, computed in the manner prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716. The net backpay awards are to be reduced by such tax withholdings as are required by Federal and State laws.

Dwayne A. Johnson	$ 974.90
Russell Bishop	8828.40
John Harris	13583.20
	23386.50

Dated at Washington, D.C.

/s/ Joel A. Harmatz
Joel A. Harmatz
Administrative Law Judge